

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,

Plaintiff,

v.

TYSON FOODS, INC., et al.,

Defendants.

Case No: 05-CV-0329-GKF-SAJ

**STATE OF OKLAHOMA’S REPLY IN SUPPORT OF OBJECTIONS
TO THE MAGISTRATE JUDGE’S MAY 20, 2008 OPINION AND ORDER**

Plaintiff, the State of Oklahoma, ex. rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (hereinafter “the State”), respectfully submits its Reply in Support of Objections to the Magistrate Judge’s May 20, 2008 Opinion and Order (“May 20 Order”):

INTRODUCTORY STATEMENT

In their “Response in Opposition to Plaintiffs’ Objections to Magistrate Judge Joyner’s May 20, 2008 Opinion and Order Compelling Withheld Data and Sanctioning Plaintiffs” (hereinafter “Defendants’ Response”), Defendants argue that the Magistrate Judge properly granted the Defendants’ Motion to Compel and properly sanctioned the State under Rule 37(a)(5)(A) for producing materials after Defendants filed their Motion to Compel. Defendants’ Response, Dkt. #1726 at 6 – 8.¹ However, based on the uncontested facts, these arguments must

¹ In their Response, Defendants unfairly suggest that the State's productions of April 29 and May 2, 2008 were untimely. Defendants' Response, Dkt. #1726 at 2. However, these were productions of documents and data generated or completed after March 25, 2008 – when the State filed its response to the Motion to Compel. Thus, these productions only demonstrate the State's diligence in producing new data and documents. One of the complexities in this case is

be rejected. Under the applicable Rules, the Magistrate Judge was actually prohibited from even hearing the Motion to Compel, much less granting it and imposing sanctions.

In their Response, Defendants make a single passing reference to the Magistrate Judge's failure to cite to the "Local Rule", suggesting that this "Local Rule" is unimportant. Defendants' Response, Dkt. #1726 at 6. But Local Civil Rule 37.1 places mandatory obligations on the Court. In particular, Local Civil Rule 37.1 provides that "this Court shall refuse to hear any [discovery dispute] motion or objection unless counsel for movant first advises the Court in writing that counsel personally have met and conferred in good faith and, after a sincere attempt to resolve differences, have been unable to reach accord." (Emphasis added.) The phrase "shall refuse" is the language of mandate, and the record shows that Defendants did not satisfy the meet and confer requirements imposed by Local Civil Rule 37.1. Consequently, the Magistrate Judge erred in granting the Motion to Compel and in failing to even address whether Defendants complied with the requirements of Local Civil Rule 37.1.

Also, while the Defendants claim that the Magistrate Judge properly awarded fees under Rule 37(a)(5)(A), they fail to mention that Rule 37(a)(5)(A) provides that "... the court must not order th[e] payment [of attorney fees] if:

- (i) the movant filed the motion [to compel] before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust."

(Emphasis added.) The mandatory language of Rule 37(a)(5)(A)(i), (ii) and (iii) leaves no room for discretion. If any one of these enumerated exceptions is met, the court must not impose an

the continual generation of new data, and the State has always sought to timely produce this new data in good faith. It is completely improper and intellectually dishonest for the Defendants to seek to penalize the State for "untimely" production of data which did not even exist at the time the Motion to Compel was filed.

award of attorney fees. These enumerated exceptions cannot be cast aside or ignored as Defendants urge. The facts show that the State meets all three of these exceptions. Yet, the Magistrate Judge failed to determine whether the State fulfilled *any* of them. This is reversible error.

For these reasons, and the additional reasons stated below, the Court should reject Defendants' arguments and set aside the Magistrate Judge's May 20, 2008 Order.

UNCONTESTED FACTS

There are several important statements of fact from the State's Objections which have not been contested in Defendants' Response. For instance, it is uncontested that:

- ▶ "The January 5, 2007 Order contained no requirements with respect to supplemental production or the timeliness of supplemental production."
- ▶ "[T]he State has produced tens of thousands of pages of lab reports, chain of custody reports, field sheets, field books and quality assurance reports similar to those at issue" in the Motion to Compel.
- ▶ "Communications between the parties on the production issues have been almost exclusively in writing, and the parties never reached an impasse on any production matter at issue prior to the filing of the subject Motion to Compel."
- ▶ The last two letters, before Defendants filed their Motion to Compel, between the parties concerning the subject discovery dispute were the November 30, 2007 letter from Robert George to Louis Bullock and the December 19, 2007 letter from Mr. Bullock to Mr. George.
- ▶ "Mr. George ended the November 30, 2007 letter by acknowledging Defendants' duty to meet and confer before filing any motion to compel: 'If Defendants' above-mentioned concerns are not fully and adequately addressed . . . the parties will need to schedule a meet and confer and, if necessary, bring the appropriate motion.'"
- ▶ "[N]owhere in the December 19, 2007 letter did the State refuse to produce any of the data requested by Defendants in the November 30, 2007 letter."
- ▶ "Mr. Bullock ended the December 19, 2007 letter by stating, 'I trust this letter is fully responsive to your requests.'"

- ▶ “. . . Defendants never replied to the December 19, 2007 letter and never sought to meet and confer with respect to any issue addressed in the letter.”
- ▶ “Without any warning, and during the hearing on the State’s Motion for Preliminary Injunction, Defendants filed their Motion to Compel on February 29, 2008 – over two months after Mr. Bullock’s December 19, 2007 letter.”
- ▶ “. . . Defendants did not request an award of attorney fees and costs as part of the Motion to Compel.”

Dkt. #1716 at 3 – 6. These uncontested facts overwhelmingly support the merits of the State’s Objections.

ARGUMENT AND AUTHORITY

I. DEFENDANTS’ ADMITTED MEET AND CONFER FAILURES PROVE THAT THE MAGISTRATE JUDGE’S GRANT OF THE MOTION TO COMPEL AND AWARD OF SANCTIONS WAS IN ERROR

In their Response, Defendants claim that they filed their Motion to Compel because they unilaterally “conclude[d] that only the Court could force Plaintiffs [sic] to comply” Defendants’ Response at 2. As noted above, it is uncontested that Defendants made no effort after the correspondence of November 30 and December 19, 2007, to meet and confer as they had promised (and were obligated) to do. And Defendants do not contest that the parties had yet to reach an impasse on any of the subject discovery issues at the time that the Motion to Compel was filed. Defendants’ alleged unilateral conclusion that Court intervention was necessary does not excuse compliance with Rule Fed. R. Civ. P. 37(a)(1), Fed. R. Civ. P. 37(a)(5)(A)(i) or Local Civil Rule 37.1. Nevertheless, the Magistrate Judge failed to cite or consider any of these meet and confer requirements in the May 20 Order.

A. The Magistrate Judge Erred in Granting the Motion to Compel

Local Civil Rule 37.1 applies to “all motions or objections relating to discovery pursuant to Fed. R. Civ. P. 26 through 37 and 45” (Emphasis added.) In framing his analysis of the

Motion to Compel, the Magistrate Judge stated that “the court must determine whether Plaintiff has complied with its statutory duty [under Rule 26(e)] to supplement in a timely manner prior to and after the filing of Defendants’ motion.” Dkt. #1710 at 3 (emphasis added). Indeed, because the January 5, 2007 Order did not contain any supplementation requirements, any failure to timely supplement could not have been a violation of that Order. Ultimately, the Magistrate Judge nevertheless determined that the State violated Rule 26(e). Dkt. #1710 at 2 and 6. Further, even if Rule 26(e) were not directly applicable, the Motion to Compel is at least “relating to discovery pursuant to Fed. R. Civ. P. 26 through 37” (Emphasis added.) Thus, Local Civil Rule 37.1 applies.

The uncontested facts prove that Defendants did not comply with Local Civil Rule 37.1. That is, Defendants did not “advise[] the Court in writing that counsel personally have met and conferred in good faith and, after a sincere attempt to resolve differences, have been unable to reach accord.” In fact, the uncontested facts show that Defendants filed the Motion to Compel while informal *written* communications were ongoing and without scheduling any meet and confer session as promised in the November 30, 2007 letter. Under such circumstances, the Local Rule prohibited the Magistrate Judge from even hearing the Motion to Compel, let alone granting it and imposing sanctions. Defendants assert that the Magistrate Judge found that “the Rules impose no duty to meet and confer regarding another party’s obligation to supplement discovery responses.” Dkt. #1726 at 5. The State does not believe that this is an accurate reading of the Magistrate Judge’s May 20 Order. But, even if the Magistrate Judge did make such a finding, such finding is facially contrary to Local Civil Rule 37.1. The Magistrate Judge’s failure to cite or consider Local Civil Rule 37.1 was erroneous, and his grant of the Motion to Compel is contrary to law.

B. The Magistrate Judge Erred in Awarding Attorney Fees

Similarly, while Defendants now claim that they never had any statutory duty to meet and confer with the State prior to filing the Motion to Compel – Defendants sought (in their reply brief) an award of attorney fees under Fed. R. Civ. P. 37(a)(5)(A) – on the ground that the State produced materials after the Motion was filed. Dkt. #1672 at 3. And the Magistrate Judge awarded fees under Rule 37(a)(5)(A). Dkt. #1710 at 5 – 6. Defendants first raised this request for fees in their reply in support of the Motion to Compel. As established, courts are prohibited from imposing sanctions under Rule 37(a)(5)(A) if “the movant filed the motion [to compel] before attempting in good faith to obtain the disclosure or discovery without court action.” Fed. R. Civ. P. 37(a)(5)(A)(i). The uncontested facts demonstrate Defendants’ unabashed lack of good faith effort to obtain the discovery without court action prior to filing the Motion to Compel. Defendants cannot seek fees under 37(a)(5)(A) on the one hand and assert that they have no meet and confer obligations on the other.

In their Response, Defendants claim that the underlying Motion to Compel “was accompanied by several letters and emails evidencing a year’s worth of attempts at conferring with Plaintiffs about their failure to abide by the Court’s January 5, 2007 Order.” Dkt. #1726. However, Defendants tellingly do not quote the actual content of these written communications, as the State has done here. These written communications merely “evidence” ongoing discussion of the evolving discovery issues that are inherent in a case where new data and materials are being generated on a continual basis. The letters and emails show that there was no impasse, and that, as of December 19, 2007, the State in fact had every reason to believe that Defendants’ alleged concerns had been adequately addressed. Under these facts, the Magistrate Judge plainly erred in awarding fees under Rule 37(a)(5)(A).

II. BECAUSE THE STATE DID NOT VIOLATE THE JANUARY 5, 2007 ORDER, THE MAGISTRATE JUDGE’S AWARD OF SANCTIONS UNDER RULE 37(b)(2) IS CONTRARY TO LAW

While the Magistrate Judge also apparently awarded fees under Rule 37(b)(2) (Dkt. #1710 at 5 – 6), Defendants never sought fees under Rule 37(b)(2). Not surprisingly, however, now that the Magistrate Judge has assessed fees under Rule 37(b)(2) *sua sponte*, Defendants are fully supportive of his ruling. Dkt. #1726 at 6. More importantly, Rule 37(b) only provides for sanctions when an order has been violated. As shown, it is uncontested that the January 5, 2007 did not contain any supplementation requirements. Thus, the Magistrate Judge’s May 20 Order amounts to a finding that the State violated Rule 26(e) – not the January 5, 2007 Order. The entire impetus of the Magistrate Judge’s analysis was the question of whether the State violated its statutory duty to timely supplement production. Because the Magistrate Judge did not find that the State violated the January 5, 2007 Order, it was clearly erroneous and contrary to law for the Magistrate Judge to award fees under Rule 37(b).

III. DEFENDANTS MISCONSTRUE THE STATE’S ARGUMENTS WITH RESPECT TO THE “SUBSTANTIALLY JUSTIFIED” AND “OTHER CIRCUMSTANCES” PROVISIONS OF RULE 37(a)(5)(A)

Rather than address the requirements of Rule 37(a)(5)(A)(ii) and (iii), the Magistrate Judge simply concluded that because “some of the data that should have been produced was not produced until after the motion to compel was filed and . . . the Federal Rules require the court to address an appropriate remedy.” Dkt. #1710 at 4. Again, under Fed. R. Civ. P. 37(a)(5)(A)(ii) and (iii), when discovery is produced after a motion to compel is filed: “. . . the court must not order th[e] payment [of attorney fees] if . . . the opposing party’s nondisclosure, response, or objection was substantially justified; or . . . other circumstances make an award of expenses unjust” (emphasis added). Though in the May 20 Order, the Magistrate Judge did not consider

the State's arguments that its production of data and other items after the Motion to Compel was substantially justified and that other circumstances render an award of fees unjust.

In their Response, Defendants argue only that the "Court's failure to cite in its Order the romanette sub-provisions under Rule 37(a)(5)(A) in no way constitutes reversible error." Defendants' Response at 8. However, the State has not argued that the Magistrate Judge's mere "failure to cite" Fed. R. Civ. P. 37(a)(5)(A)(ii) and (iii) is reversible error. Instead, the State has argued:

. . . the Magistrate Judge plainly did not consider [the State's] arguments in the context of Rule 37(a)(5)(A)(ii) or (iii); and the Magistrate Judge's failure to consider the impact of these arguments under Rule 37(a)(5)(A)(ii) or (iii) was clear error. Moreover, the . . . circumstances taken together do, in fact, render an award of fees unjust under Rule 37(a)(5)(A)(iii).

Dkt. #1716 at 12. Accordingly, the Magistrate Judge erred in awarding fees without first taking into account whether the State had met the "substantially justified" or "other circumstances" exceptions. And the facts aptly demonstrate that the State did meet these exceptions. *See* Dkt. # Dkt. #1691 at 5–6.

IV. IT WAS ERROR FOR THE MAGISTRATE JUDGE TO GRANT ATTORNEY FEES, AS THE REQUEST FOR ATTORNEY FEES WAS NOT RAISED BY DEFENDANTS UNTIL THE REPLY BRIEF

Defendants offer no valid justification for their admitted failure to request attorney fees until the reply brief. A reply brief is not the proper vehicle for a new request for relief, and there is no reasonable excuse for Defendants' failure to first seek fees in the Motion to Compel. As such, the request for fees should have been denied by the Magistrate Judge.

WHEREFORE, premises considered, the State respectfully requests that the Court set aside the Magistrate Judge's May 20, 2008 Opinion and Order granting Defendants' Motion to Compel and Defendants' belated request for attorney fees and costs.

Respectfully submitted,

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I certify that on the 30th day of June, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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